

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

PATTI BROWNE,

Appellant,

v.

PIERCE COUNTY and State of
Washington DEPARTMENT OF
ECOLOGY,

Respondents,

and

ROBERT PAVOLKA,

Respondent-Intervenor.

SHB No. 90-31

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of the denial of a shoreline variance permit, came on for formal hearing before the Board on October 25, 1990, at Tacoma, Washington and on October 26, 1990, at Lacey, Washington. Present for the Board were Members: Harold S. Zimmerman, Presiding; Judith A. Bendor, Chair; Annette S. McGee, Nancy Burnett, Jon Wagner and David Wolfenbarger.

Attorney Robert E. Mack of Smith, Alling and Lane, represented appellant Patti Browne; Stephen K. Shelton, Deputy Prosecuting Attorney, represented respondent Pierce County; Kerry O'Hara, Assistant Attorney General, represented respondent Department of Ecology; and Robert Pavolka represented himself as respondent-intervenor. The proceedings were recorded on October 25, 1990 by Janet Neer, court reporter with Robert H. Lewis and

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(1)

1 Associates, and on October 26, 1990, by court reporter Bibi Carter of
2 Gene Barker and Associates.

3 Witnesses were sworn and testified. Exhibits were admitted and
4 examined. The last closing brief was filed on November 13, 1990.
5 From the testimony heard, exhibits examined, and counsel's
6 contentions, the Board makes the following:

7 FINDINGS OF FACT

8 I

9 Ms. Patti L. Browne owns a shoreline beach cottage at 5028
10 Tok-A-Lou Avenue, NE, in the unincorporated Brown's Point area, near
11 Tacoma. The home is in an urban shoreline environment, as designated
12 in the Pierce County Shoreline Master Program (SMP).

13 II

14 In 1977 when Ms. Browne moved to the cottage with her six-year
15 old daughter there was an existing deck and a red tile bungalow-style
16 roof of comparable height to the neighboring cottage to the north.
17 The house contained from 600 to 800 square feet of livable space.
18 The Browne cottage was located at the ordinary high water mark
19 immediately behind a bulkhead.

20 III

21 On July 22, 1977, Ms. Browne filed with the Pierce County
22 Planning Department an application for a shoreline variance permit to
23 construct changes to her house, including adding a deck.

1 A public hearing on the application was held September 14, 1977,
2 before the Pierce County Shoreline Technical Advisory Committee.
3 Property owners within 300 feet of the proposed project boundaries
4 were notified by mail about the hearing. The Committee recommended
5 approval of the variance.

6 IV

7 On September 26, 1977, the Board of Pierce County Commissioners
8 approved the variance, subject to conditions, and forwarded their
9 action to the State Department of Ecology and the State Attorney
10 General's office for review.

11 The unanimous approval of the 1977 variance was subject to these
12 conditions:

- 13 1. That any excavated material or excess building
14 material shall be disposed of in a proper manner at an
upland location.
- 15 2. No portion of the proposed addition shall extend
16 waterward of the existing bulkhead.
- 17 3. The height of the proposed addition shall be equal to
18 or less than the height of the existing beach cabin.
- 19 4. The construction or substantial progress toward
20 construction of this project must be undertaken within
two years after the final approval of this permit or
the permit shall be terminated.

21 V

22 The site plans submitted at that time to the County indicated
23 that the bulkhead and proposed addition were in the same line, thus
24

25
26 FINAL FINDINGS OF FACT,
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1 demonstrating compliance with Condition Number 2: "No portion of the
2 proposed addition shall extend waterward of the existing bulkhead."

3 VI

4 The Pierce County Building Department in 1979 issued Patti Browne
5 a building permit. On-site, however, the County determined that the
6 changes as designed could not be constructed without excavating the
7 bank, and gave her oral approval to have the addition cantilevered out
8 over the water. Mrs. Browne proceeded with the project on that
9 basis. The addition, including part of the first floor and the deck
10 were built approximately waterward of the bulkhead, with the house
11 extending about four feet and the deck another four feet beyond.
12 (Exh. A-12) No supports were placed on the beach.

13 VII

14 In 1984 Ms. Browne expanded her existing deck to the north and
15 drove a piling into the beach without applying for a shoreline
16 permit. The addition to the deck did not extend further waterward
17 than the 1977 expansion. The County filed criminal charges, but later
18 did not oppose the Superior Court's granting of a dismissal on January
19 18, 1985.

20 In connection with the subsequent 1989 Browne application for a
21 second story addition, the County's Deputy Prosecuting Attorney
22 advised the County Planning Division that the dismissal of the
23 criminal charges allowed the presence of the deck and overwater
24

1 portion of the house over water and no further prosecution would
2 result.

3 VIII

4 In 1989, Ms. Browne decided to add a second story onto the house
5 to extend over the water as far as the now existing first floor. The
6 architect applied for and obtained the building permit. Construction
7 began, but Pierce County subsequently issued a "stop work order" for
8 failing to obtain a shoreline permit in alleged violation of the
9 Shoreline Management Act. It was the County's position that a
10 shoreline variance permit was required. The construction was within
11 the 50 foot setback of the SMP.

12 IX

13 On September 14, 1989, Ms. Browne filed a shoreline variance
14 permit application to build the second story addition, to be within
15 the existing footprint. Pierce County staff's findings and analysis
16 concluded the applicant met the criteria for a variance, but requested
17 the hearing examiner consider several aspects, and recommended eight
18 conditions:

- 19 1. A site plan for this proposal, including
20 landscaping, shall be submitted to the Pierce
21 County Planning and Natural Resource Management
22 Department for approval and signature within three
23 years of the effective date of the final
24 decision. Failure to submit said plan within the
25 time specified will render all approvals granted
26 herein automatically null and void.
- 27 2. The structure shall remain a single-family
residence. At no time will the structure be
allowed to be used as a residence for more than
one family. The second story shall not be rented
out while the owner lives in the lower story.

3. Final site plan shall conform to the one submitted with application. Any major deviations from the submitted site plan shall require review by the Hearing Examiner before public hearing. Major deviations shall be determined by the Department of Planning and Natural Resource Management.
4. Height of the second story of the structure shall extend no more than 16 feet above the existing structure. Further expansion skyward will require approval by the Hearing Examiner at a public hearing.
5. The second story addition shall protrude no more waterward than is indicated within the final site plan. Decks shall not protrude more waterward than the first story deck protrudes. Requests for increase in deck size will require approval by the Hearing Examiner at a public hearing.
6. Completion or substantial progress toward completion of this project shall begin within two years of the effective date of the approval or the approval shall become null and void.
7. Construction must occur in a manner that protects the adjacent shorelands against erosion, uncontrolled or polluting drainage, and other factors detrimental to the environment both during and after construction.
8. All debris, overburden, and other waste materials from construction must be disposed of in such a way as to prevent their entry by erosion from drainage into any water body.

X

On November 14, 1989, the Pierce County Hearing Examiner concluded that the proposed addition to the house as conditioned complied with the relevant variance requirements. (Hereafter, the proposal as conditioned will be referred to as the "project").

1 The Hearing Examiner's decision was appealed by Robert Pavolka,
2 who asked for reconsideration of the decision, November 27, 1989. The
3 request was denied December 22, 1989.

4 XI

5 Mr. Pavolka on January 8, 1990, appealed the decision to the
6 Pierce County Council, which held a hearing on the appeal on March 12,
7 1990, and reversed the decision of the Hearing Examiner. The Council
8 concluded that the hardship created in developing the lot was
9 self-inflicted and due to the applicant's own actions.

10 Because the recording device malfunctioned during this hearing,
11 the Council held a second public hearing on April 16, 1990. It again
12 reversed the Hearing Examiner's decision, thereby denying Patti
13 Browne's request for a shoreline variance permit.

14 Ms. Browne filed an appeal with the Shoreline Hearings Board
15 which became our SHB No. 90-31.

16 XII

17 The Brown's Point area near the Browne home is an area where
18 waterfront homes are closely sited one next to the other. A steep
19 bluff rises above them. Residences on the bluff are connected to the
20 lower lots by steep stairs down a nearly vertical bank. Few natural
21 areas remain for protection.

XIII

Ms. Browne has a possessory interest in 6,000 square feet of property on the waterfront, where her house is located. The lot's topography is characteristic of the area, with a steep bank between the overall steep waterfront level and the bluff. Access to her house is through the upper area. Her property is limited on each side by property boundaries which prevent expansion of the house either north or south. To expand landward would require excavating into the steep bank and could require blasting. Such excavation is likely to have a significant adverse impact.

Due to the slope of the property and its narrowness, a second story addition is the most logical way to expand.

XIV

The Brown's Point area has many beach homes, rental apartments, and cottages, some of one-story, others of two-stories. Ms. Browne's project is compatible with other uses and does not constitute a special privilege.

XV

View blockage due to the project is miniscule, provided the construction is completed as shown on the drawings at Exh. A-12, i.e. no second story deck or railing. The steepness of the terrain protects the expansive water views from homes on the upper lots. Nearby waterfront property owners' views will not be significantly affected by this project.

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XVI

Beach access is either through the individual private properties, already highly developed, or from a public county park located a few hundred yards north at a former lighthouse location. This project will not in any way impede that access.

XVII

The tide fluctuates a considerable distance between the bulkhead and shore. There are several large rocks on the tidelands which impede larger boats' navigation near the shore. This second floor project will not in any way negatively impact the public rights of navigation.

XVIII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

The Shorelines Hearings Board has jurisdiction in the instant case. Chapt. 90.58. RCW.

II

The Board reviews the proposal for consistency with the Pierce County Shoreline Master Program (SMP) and the Shoreline Management Act (SMA).

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III

Under the Pierce County Shoreline Master Program the instant case is governed by the urban environment and residential development.

IV

The Board faced difficult, historic issues concerning previous actions of the County on the overwater portions of the structure. The County's direct responsibility in authorizing the first floor structure to be built overwater cannot be ignored. We conclude that the County's actions combined with the passage of time have made the 1977 changes to be both non-conforming and legal.

V

The primary issues in this case focus on WAC 173-14-150, the criteria for granting or denying a variance. In considering this permit, we include all the conditions recommended by the County Planning staff (see Finding of Fact X, above).

VI

The Board concludes that the project meets all the variance permit criteria.

WAC 173-14-150(2)(a) requires:

That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes or significantly interferes with a reasonable use of the property not otherwise prohibited by the master program;

The Board concludes that the denial of the variance and consequent eliminating of the addition to the appellant's home would significantly interfere with reasonable use of the property. With the expansion the house would be similar to others on the waterfront.

VII

WAC 173-14-150(2)(b) requires:

That the hardship above is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions;

The Board concludes that the hardship in developing this lot is caused by the shape of the lot and its steep slope, both of which contribute to preventing an addition in any direction but upward without significant disruption to the environment.

VIII

WAC 173-014-150(2)(c) requires:

That the design of the project is compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or the shoreline environment;

The Board concludes that the design of the project is compatible with surrounding developments and the shoreline environment. While the Board recognizes that any construction next-door will have some impact, it concludes that the would be neither substantial nor significantly adverse.

IX

WAC 173-14-150(2)(d) requires:

That the requested variance does not constitute a grant of special privilege not enjoyed by the other properties in the area, and is the minimum necessary to afford relief;

The Board concludes that the expansion is not a special privilege, because other homeowners have similar structures along the shoreline, several have two stories. Homeowners within the immediate area enjoy views equal to what the appellant would have with the proposed addition. The Board further concludes that the variance will be the minimum necessary to afford relief.

X

WAC 173-14-150(2)(e) requires:

(e) That the public interest will suffer no substantial detrimental effect.

The Board concludes that the granting of the variance will not negatively impact the public interest in such a manner as to cause substantial detrimental effect.

XI

WAC 173-14-150(4) requires the consideration whether there would be a cumulative negative impact if additional like requests were granted. The second story addition, alone, is what we analyze. This proposal does not have adverse impacts and therefore cumulative

1 impacts of such like proposals would be nil. We trust that no other
2 proposal would present such unusual County involvement. WAC
3 173-14-150(4) is not violated.

4 XII

5 The project does not contravene any statewide shoreline values
6 inherent in the Act.

7 We are not persuaded that the project constitutes an enlargement,
8 intensification, or increase of its nonconformity so as to require the
9 denial of this permit. WAC 173-14-055(2). A denial on this basis
10 would not further shoreline values.

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12 XIII

13 Any Finding of Fact deemed to be a Conclusion of Law is hereby
14 adopted as such. From these Conclusions of Law, the Board enters this:
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ORDER

Pierce County Council's denial of the Browne shoreline variance permit is REVERSED. The matter is REMANDED for issuance of a permit consistent with this opinion, to include conditions recited at Finding of Fact IX.

DONE this 3rd day of January, 1991, 1990.

SHORELINES HEARINGS BOARD

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Presiding

Judith A. Bendor
JUDITH A. BENDOR, Chair

Annette S. McGee
ANNETTE S. MCGEE, Member

Nancy Burnett
NANCY BURNETT, Member

Jon Wagner
JON WAGNER, Member

David Wolfenbarger
DAVID WOLFENBARGER, Member

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

PATTI BROWNE,

Appellant,

v.

PIERCE COUNTY AND STATE OF
WASHINGTON DEPARTMENT OF ECOLOGY,
(after Remand),

Respondent.

90-
SHB No. 91-31

FINAL DECISION ON REMAND

This matter, the decision of the Shorelines Hearings Board, to grant a variance to Patti Browne was remanded to the Shorelines Hearings Board by Superior court Judge Donald H. Thompson, solely to determine if the second story project meets the criteria for a shoreline variance waterward of the ordinary high water mark (OHWM) as set forth in WAC 173-14-150(3).

The Board has reviewed the record.

The Board now reviews and applies variance criteria, WAC 173-14-150(3) dealing with waterward projects.

Section WAC 173-14-150(3)(a) provides:

(3) Variance permits for development that will be located either waterward of the ordinary high water mark (OHWM), as defined in RCW 90.58.030(2)(b), or within marshes, bogs, or swamps as designated by the department under chapter 173-22 WAC, may be authorized provided the applicant can demonstrate all of the following:

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(1)

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1 (a) That the strict application of the bulk,
2 dimensional or performance standards set forth in the
3 applicable master program precludes a reasonable use
4 of the property not otherwise prohibited by the master
5 program; . . .

6 Referring to Findings of Fact VI, page 4, SHB No. 90-31) the review
7 convinces the Board to conclude that the denial of the variance and
8 consequent eliminating of the addition to the appellant's home would
9 preclude a reasonable use of the property. With the expansion, the
10 house would be similar to others on the waterfront.

11 The Board now reviews the earlier Findings of Fact and applies
12 WAC 173-14-150(3)(b):

13 (b) That the proposal is consistent with the
14 criteria established under (2)(b) through (e) of this
15 section.

16 WAC 173-14-150(2)(b) requires:

17 That the hardship above is specifically related to
18 the property, and is the result of unique conditions
19 such as irregular lot shape, size, or natural features
20 and the application of the master program, and not,
21 for example, from deed restrictions or the applicant's
22 own actions;

23 The Board concludes that the hardship in development of this lot is
24 caused by the shape of the lot and its steep slope, both of which
25 contribute to preventing an addition in any direction but upward
26 without significant disruption to the environment.

27 WAC 173-14-150(2)(c) requires:

 That the design of the project is compatible with
 other permitted activities in the area and will not
 cause adverse effects to adjacent properties or the
 shoreline environment;

1 The Board concludes that the design of the project is compatible with
2 surrounding developments and the shoreline environment. While the
3 Board recognizes that any construction next door will have some
4 impact, it concludes that it would be neither substantial nor
5 significantly adverse.

6
7 WAC 173-14-150(2)(d) requires:

8 *That the requested variance does not constitute a*
9 *grant of special privilege not enjoyed by the other*
10 *properties in the area, and is the minimum necessary*
11 *to afford relief;*

12 The Board concludes that the expansion is not a special privilege,
13 because other homeowners have similar structures along the shoreline,
14 several have two stories. Homeowners within the immediate area enjoy
15 views equal to what the appellant would have with the proposed
16 addition. The Board further concludes that the variance will be the
17 minimum necessary to afford relief.

18 WAC 173-14-150(2)(e) requires:

19 *(e) That the public interest will suffer no*
20 *substantial detrimental effect.*

21 The Board concludes that the granting of the variance will not
22 negatively impact the public interest in such a manner as to cause
23 substantial detrimental effect.

1 WAC 173-14-150(3)(c) requires "that the public rights of
2 navigation and use of the shoreline will not be adversely affected."

3 The Board found (see Findings of Fact (XVII) that the tide
4 fluctuates a considerable distance between the bulkhead and shore.
5 There are several large rocks on the tidelands which impeded larger
6 boats' navigation near the shore. The Board concludes that this
7 second floor project will not in any way negatively impact the public
8 rights of navigation.

9 The Board now concludes that the second floor project of the
10 Patti Browne residence at 5028 Tok-A-Lou Avenue NE, Brown's Point,
11 Pierce County, meets the criteria for a shoreline variance waterward
12 of the ordinary high water mark as set forth in WAC 173-14-150(3).
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ORDER

The Board reaffirms its decision to reverse the Pierce County Council's denial of the Browne shoreline variance permit, and hereby; orders that the appeal be remanded to Pierce County for action consistent with the earlier decision, as modified by this Order.

DONE this 17th day of October, 1991.

SHORELINES HEARINGS BOARD

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Presiding

Judith A. Bendor
JUDITH A. BENDOR, Member

Annette S. McGee
ANNETTE S. M^CGEE, Member

Nancy Burnett
NANCY BURNETT, Member

Jon Wagner (a.m.)
JON WAGNER, Member

Dave Wolfenbarger
DAVE WOLFENBARGER, Member

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